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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HELMICK,

Petitioner,

v.

ROBERT LAUNDERS and MICHAEL DOTY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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40 pp

QUESTIONS PRESENTED

1. In an action under 42 U.S.C. 1983 (1982), is a prosecutor entitled to the affirmative defense of absolute immunity when the conduct he is alleged to have engaged in, and on which he based his claim of immunity, consisted of performance of an investigatory function?

2. In an action under 42 U.S.C. 1983 (1982), is an investigator entitled to a grant of summary judgment based on the affirmative defense of qualified immunity when: (A) the law was clearly established that the type of conduct in which he allegedly engaged was unconsitutional at the time of his conduct, and hence he could not have had a reasonable belief his conduct was legal; and (B) there existed a genuine issue of material fact as to the issue of alleged consent to enter premises?*

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* The issue of qualified immunity presently is before this Court in No. 85-1437.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HELMICK, PETITIONER,

v.

ROBERT LAUNDERS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

John Helmick petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-11a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

In the complaint, CR-1, it is alleged that defendant Orange County, California deputy district attorney Robert Launders and Anaheim, California fire department employee Michael Doty, illegally entered and conducted a search of John Helmick's Peasant Fare Restaurant, in Anaheim, California, on January 8, 1981. Id. at p. 4, aver. 14.

Launders filed a motion for summary judgment, CR-97, and petitioner filed opposition to that motion. CR-99, 100, and 101. Specifically, in opposition to that motion petitioner

filed a declaration in which he set forth facts to demonstrate that no consent was given by him for Launders (or Doty) to enter his Restaurant, nor could any consent for Launders (or Doty) to have entered been given by any other person. CR-101. The court denied the motion. CR-107. (January 19, 1983.)

Thereafter, in August 1983, Doty filed a motion for summary judgment, CR-113-17, 125, and Launders moved for reconsideration of the denial of his prior motion for summary judgment. CR-118, 125 (no entry in the Clerk's Record evidences the filing of this motion). The court granted the motions, CR-120-22, over petitioner's objections. CR-115, 118, and 119.

Pursuant to the Local Rules of the United States District Court for the Central District of California, Rule 7.16, petitioner was required "[not to repeat] in any manner . . . any oral or written argument made . . . in

opposition to the original motion." See Appendix B for copy of Local Rule 7.16. Therefore, petitioner was prohibited from resubmitting Helmick's declaration filed in opposition to Launders' original motion for summary judgment, but Helmick incorporated that declaration, CR-101, in his opposition, and thereby, and by virtue of the provisions of Local Rule 7.16, placed before the court his dispute to the issue of consent to enter.

The court found that "As was his practice, Deputy District Attorney Launders went to the scene of the arson fire [at Helmick's restaurant]. Upon consent and authorization of the owner of the property, Mr. Launders went inside the restaurant to walk through the premises." CR-120. It was undisputed that Doty went with Launders. The court also found that "Investigative functions carried out pursuant to the preparation of a prosecutor's case also enjoys [sic] absolute [prosecutorial] immunity.

(Freeman on behalf of the Sanctuary v. Hittle, No. 82-3383 [9th Cir. June 13, 1983, Slip Op. at 2779)." CR-120. The court granted judgment to both Launders and Doty. CR-121-22.

REASONS FOR GRANTING PETITION

1. There has been a faulty construction of decisions of this Court which will affect virtually every action under 42 U.S.C. 1983 in which absolute or qualified immunity is asserted as an affirmative defense.

2. Public officials have used methods which are alien to our American system of justice.

3. The opinion below is at odds with

A. decisions in the same Ninth Circuit, and

B. decisions in other circuits.

The fundamental civil rights laws which govern the conduct of all law enforcement officers throughout this County and which provide for remedies for those who allege and prove

that their federal civil rights have been violated have been interpreted so as to pervert their meaning as defined by this Court, so as to invite illegal conduct by public officials, and so as to impugn the integrity of the federal courts.

Specifically, 42 U.S.C. 1983 has been interpreted in such a way as to provide a defense which does not exist, and with respect to which other decisions in both the same, Ninth Circuit and in other circuits are at odds.

1. THERE HAS BEEN A FAULTY CONSTRUCTION OF THIS COURT'S INTERPRETATION OF ABSOLUTE, PROSECUTORIAL IMMUNITY.

In Imbler v. Pachtman, 424 U.S. 409, 411 (1976), this Court decided the question "whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amendable [sic] to suit under 42 U.S.C. 1983. . . ."

In answering that question, the Court found that it:

> [A]gree[d] with the Court of Appeals that respondent's [prosecutor's] activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.

Id. at 431-32.

Since Imbler's decision no circuit court in this Country extended the scope of absolute prosecutorial immunity to acts engaged in by a prosecutor acting in an investigative role, until the Ninth Circuit decided Freeman. (Freeman then was followed by the unpublished opinion in the instant case, and then by another skewed opinion on absolute judicial and prosecutorial immunity. Ashelman v. Pope, 793 F.2d 1972 [9th Cir. 1986] [assigned a designation in the West system as of the date of this Petition was drafted, but not yet available in other than slip opinion form] [absolute immunity turns not on the function of the acts allegedly engaged in, but rather on whether the "ultimate acts are judicial actions," as to judges, and on whether prosecutor's "activities [are] taken within the scope of their [prosecutorial] authority." Hence, according to the

Ninth Circuit, immunity no longer is functional, but depends rather on "ultimate acts" and "scope of authority."])

Freeman is an aberrant decision, the only one of its kind in the United States Court system. Prosecutors do not have absolute immunity for the performance of functions which are not quasi-judicial in nature. Bothke v. Fluor, 701 F.2d 184 (9th Cir. 1983) (table affirmance without decision), 713 F.2d 1405 (9th Cir. 1983), cert. granted 104 S. Ct. 3566 (1984) (vacated and remanded with instructions to reconsider in light of Davis v. Scherer, 104 S. Ct. 3012 [1984]), 739 F.2d 484 (9th Cir. 1984) (remand to determine if plaintiff can show if rights alleged to have been violated were clearly established at the time of the conduct in issue, and hence, if they were, whether qualified immunity would be an available defense).

Freeman is based on Atkins v. Lanning, 556 F.2d 485, 488-89 (10th Cir. 1977), and O'Connor v. State of Nevada, 686 F.2d 749, 750 (9th Cir. 1982). Freeman does not discuss those cases, and simply sets them forth as its basis for its holding that prosecutors enjoy absolute, as opposed to qualified, immunity for carrying out investigative functions. Neither of those cases stands for that proposition, and not one other case found stands for that proposition.

In short, immunity is functional and attaches not to the title of a position held by one who claims it, but to the particular activity in which one is engaged at the time one is claimed to have violated the rights of another. Harlow v. Fitzgerald, 102 S.Ct 2727 (1982). Since Defendant Launders was carrying out an investigative function when he allegedly, and admittedly, had a "walk through" of petitioner's premises, he is, at best, entitled to

assert qualified immunity as an affirmative defense. Since the law concerning warrantless entries was clear at the time of the entry, "Investigations of a fire by search of the fire-damaged premises once the fire has been extinguished and fire and police officials have left the scene are probably illegal unless a search warrant is first obtained[,]" RT-November 8-9, 1984, Volume 1-A, at page 130, lines 15-20, Launders would not even be entitled to qualified immunity. Yet the court granted summary judgment in his favor notwithstanding the existence of a contested issue of material fact and the fact that Launders was not entitled to any immunity at all.

The Ninth Circuit decided this same issue in Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965) (a prosecutor may be functioning as an investigator, who is not entitled to immunity, merely by directing policy evidence gathering). In the instant case, prosecutor Launders did

much more than 'direct evidence gathering': he, himself, with Doty, conducted an illegal search in an attempt to gather evidence. See also, Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974); Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), cert. denied, 415 U.S. 917, 94 S. Ct. 1413, 39 L. Ed. 2d 471 (1974); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955).

This Court decided this same issue in Mitchell v. Forsythe, 105 S. Ct. 2806 (1985):

> [Defendant United States Attorney General's] claim, then, must rest not on the Attorney General's position within the Executive Branch, but on the nature of the functions he was performing in this case. [Citation to Harlow, supra.] Because [the Attorney General] was not acting in a prosecutorial capacity in this case, the situations in which we have

> applied a functional approach to absolute immunity questions provide scant support for blanket immunization of his performance.

105 S. Ct. at 2813. The Court continued:

> This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

Id. at 2814. Launders was not entitled to summary judgment, nor was Doty, on the issue of immunity, and the judgment of the Court of Appeals for the Ninth Circuit affirming that grant of summary judgment is based on a faulty construction of this Court's interpretation of absolute, prosecutorial immunity, and the issue should be certified to the Ninth Circuit. The Circuit Court's finding that "[t]he undisputed

purpose of Launders' search was to 'look around' the burned restaurant and get a feel for the premises in preparation for the prosecution, rather than to collect evidence[,]" opinion at Appendix 1, p. 6a, does not operate to remove from his investigative function, and place in his prosecutorial, quasi-judicial function, the act in which Launders engaged: a warrantless entry and search. The entry and search took place on January 8, 1981, CR-1, and Launders caused charges to be filed against Helmick on December 22, 1980, Appendix 1, p. 2a, before the entry and search. Hence, Launders already had performed his prosecutorial function of initiating the prosecution, and was not in the process of presenting the case in court.

The question of the availability of absolute, prosecutorial immunity should be certified to the United States Court of Appeals for the Ninth Circuit.

2. THE CONSTRUCTION GIVEN BY THE NINTH CIRCUIT TO ABSOLUTE IMMUNITY WILL OPERATE TO PERMIT PUBLIC OFFICIALS TO ESCAPE LIABILITY FOR WRONGFUL CONDUCT BASED ON A THEORY WHICH IS INCORRECT.

In the complaint, CR-1, it is alleged that defendants used methods alien to our Constitution. To permit these public officials to escape potential liability based on a theory of defense which is incorrect, is a result which will have a significant deleterious effect on constitutional litigation at least throughout the vast Ninth Circuit. Therefore, this Court should grant certiorari.

3. THE OPINION BELOW [AND ASHELMAN] IS AT ODDS BOTH WITH DECISIONS OF THIS COURT, THE NINTH CIRCUIT, AND WITH OTHER CIRCUITS.

A. The opinion below is at odds with this Court's holding in Davis, supra.

B. The opinion below is at odds with other Ninth Circuit decisions. See Bothke, supra; Robichaud, supra.

C. The opinion below is at odds with decisions in other circuits. See Guerro, supra; Hampton, supra; Lewis, supra; and more recently, Henderson v. Lopez, 790 F.2d 44, 45 (7th Cir. 1986) ("public prosecutors . . . enjoy 'a qualified immunity when performing administrative or investigatory duties, but an absolute immunity when performing a quasi-judicial role.'"); Coleman v. Fritz, 754 F.2d 719, 728 n.9 (7th Cir. 1985) (same); Benavidez v. Gunnell, 722 F.2d 615, 617 (10th Cir. 1983) (same); Mother Goose v. Sendak, 770 F.2d 688, 670-75 (7th Cir. 1985), cert. denied, 106 S.Ct. 884 (1986) (same); Joseph v. Patterson, No. 84-1332 (6th Cir. July 2, 1986) (same).

Thus, the opinion below is at variance with this Court's functional approach to immunity, at least two other opinions from the same

Circuit, and at least eight opinions from the First, Fifth, Sixth, Seventh, and Tenth Circuit Courts of Appeals.

For this reason, certiorari should be granted.

4. THE EXISTENCE OF A GENUINE ISSUE OF MATERIAL FACT PREVENTED THE GRANT OF SUMMARY JUDGMENT TO DOTY.

Doty participated in Launders' entry and search. CR-1. Helmick submitted admissible evidence that there was no consent to enter or to search. CR-101.

The Ninth Circuit's decision in U.S. v. Impink, 728 F.2d 1228 (9th Cir. 1984), prevented a grant of summary judgment to either Doty or Launders on the issue of consent to search, for reasons in addition to the issue put in issue by Helmick. CR-101. In Impink, the court held:

> This case presents a situation where the third party and the defendant did

> not have "equal use of a place in which both are present." [Citation omitted.] Guilbault, the lessor, had reserved only the limited right to enter the garage to retrieve her stored property. As between the resident and a lessor with a narrowly proscribed right of access, there can be no doubt that the resident has the greater right of "access or control for most purposes." [Citation omitted.] Police should rarely seek consent from third parties who possess such limited rights of access. [Citation omitted.]

Id. at 1233.

> [W]hen the police intentionally bypass a suspect who is present and known by them to possess a superior privacy interest, the validity of third party consent is less certain.

> [C]ourts have invalidated searches solely because the consenting person had an insufficient right of access to the premises. [Citation omitted.]

Id. at 1234.

Based on the consent issue, the district court should not have granted summary judgment either to Launders or to Doty because a genuine issue of material fact prevented the grant of summary judgment. F. R. Civ. P. (West 1986) Rule 56(c); see Celotex v. Catrett, 106 S. Ct. 2548 (1986) (on motion for summary judgment, party who would have burden of proof on issue at trial must meet burden of production, and then opposing party must meet burden of production: when both sides have met burden of production, a genuine issue of material fact prevents a grant of summary judgment).

Because the issues of both entry and search, and consent are germane to both

Launders and Doty, and because the grant of summary judgment to Doty is at significant variance with the provisions of Rule 56(c) and this Court's decisions interpreting those provisions, the question of the propriety of the grant of summary judgment also should be certified.

5. CONCLUSION

For the reasons set forth, the questions presented should be certified, and a writ of certiorari should issue.

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
May 13, 1986
CATHY A. CATTERSON
U.S. COURT OF APPEALS

PEASANT FARE and JOHN S. HELMICK,	No. 84-6549
Plaintiffs/Appellants,	DC No. CV 81-4915-RG
vs.	MEMORANDUM*
AETNA CASUALTY AND SURETY CO.; AMERICAN STATES INSURANCE CO.; MICHAEL DOTY; NORMAN MORGAN; and ROBERT LAUNDERS,	
Defendants/Appellees.	

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr.,
District Judge, Presiding

Argued and Submitted
February 5, 1986 - Pasadena, California

BEFORE: FLETCHER, FERGUSON and NELSON
Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Plaintiffs, the Peasant Fare Restaurant and its owner John Helmick, appeal from grants of summary judgment in favor of defendants Launders, Doty and Morgan and from the district court's failure to include one of plaintiffs' claims against defendant insurance companies on the verdict form submitted to the jury. We affirm.

I.

In December 1980, defendant Launders, an Orange County Deputy District Attorney, was assigned to prosecute Helmick for the alleged arson involving the Peasant Fare Restaurant. Defendants Doty and Morgan are Anaheim Fire Department investigators who conducted an investigation of two fires in the restaurant. On December 22, 1980, Launders filed an information charging Hemlick with two counts of arson. This set of arson charges and a second set, filed in April 1981, were eventually dismissed.

Plaintiffs filed this action in federal district court in September 1981, alleging several causes of action: (1) breach of contract and bad faith insurance practices against defendant insurance companies Aetna and American States for refusing to pay on plaintiffs' fire insurance policy; (2) 42 U.S.C. § 1983 deprivation of property or liberty without due process against all defendants; (3) false arrest, malicious prosecution, and abuse of process against all defendants; (4) trespass against Doty and Launders; and (5) conspiracy to violate plaintiffs' civil rights against all defendants.[1/]

The district court granted summary judgment for defendant Launders, declaring him absolutely immune from a section 1983 damage action for inspecting plaintiffs' fire-damaged

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1/ Claims against the City of Anaheim and the County of Orange were dismissed.

premises. The district court also granted summary judgment for defendants Doty and Morgan, concluding that plaintiffs failed to state a cause of action against them.

The case proceeded to trial against the defendant insurance companies in October 1984. Helmick states that the court gave plaintiffs' proposed jury instructions, including instructions on conspiracy to violate their rights, to the jury. He argues that the court erred, however, by failing to include the conspiracy issue on the verdict form submitted to the jury. Helmick claims that he sent a note to the judge informing him of the omission,[2/] to which the court did not respond. Plaintiffs contend that the court's actions amounted to a directed verdict on the issue in favor of the

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2/ Plaintiffs acknowledge that this "note does not appear in the Clerk's Transcript," and the note is not included in the record on appeal. Defendant insurance companies contend that they never saw the note.

defendants. The jury returned a verdict in favor of the defendants. Plaintiffs timely appeal.[3/]

II.

A grant of summary judgment is reviewed de novo to determine whether there is any genuine issues of material fact and whether the substantive law was correctly applied. Lojek v. Thomas, 716 F.2d 675, 677 (9th Cir. 1983).

The district court correctly concluded that Launders was entitled to prosecutorial

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3/ The notice of appeal indicates that both the restaurant and Helmick appealed. A corporation may maintain some § 1983 actions, see, e.g., Marshall v. Kleppe, 637 F.2d 1217 (9th Cir. 1980) (equal protection), but not others, Hague v. Committee for Industrial Organization, 307 U.S. 496, 514 (1939) (privileges and immunities), depending on the underlying constitutional right allegedly violated. We are not certain what the basis for plaintiffs' claim is, though it probably stems from the Fourth Amendment. Because any actions the restaurant may maintain are identical to Helmick's, we do not decide whether the corporation may maintain this particular action.

immunity. We have held that prosecutors enjoy absolute immunity from lawsuits arising out of events that occur within the scope of their authority and in a quasi-judicial capacity. Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 678 (9th Cir. 1984). In Freeman v. Hittle, 708 F.2d 442, 443 (9th Cir. 1983), we held that "[i]nvestigative functions carried out pursuant to the preparation of a prosecutor's case also enjoy absolute immunity" if they are "within the scope of the prosecutor's duties in initiating and pursuing the state's case." The undisputed purpose of Launders' search was to "look around" the burned restaurant and get a feel for the premises in preparation for the prosecution, rather than to collect evidence. The district court found that this survey of the premises was part of Launders' usual preparation for prosecuting arson cases. Thus, because Launders' search of the premises was part of his advocacy role, we

conclude that he is entitled to absolute immunity.

III.

We also conclude that summary judgment in favor of Doty and Morgan was correct.

Summary judgment is appropriate if there is no genuine issue as to a material fact. Fed. R. Civ. P. 56(c). A moving party who can demonstrate it is entitled to judgment on undisputed facts is entitled to a summary judgment unless the opposing party presents evidence demonstrating that a genuine issue as to material facts exists. International Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985). Reliance on one's pleadings is insufficient to satisfy the burden of demonstrating genuine issues of material fact. Compton v. Ide, 732 F.2d 1429, 1434 (9th Cir. 1984).

Defendants Doty and Morgan presented affidavits to support their contention that no genuine dispute as to a material fact existed. In response, the plaintiffs presented no evidence, but rather submitted a Statement of Genuine Issues of Material Fact. None of these "genuine issues of material fact" counter the undisputed declarations of the defendants.

The summary judgment in favor of Doty and Morgan was also correct because they enjoyed good faith immunity for their actions. Qualified immunity is appropriate "if a reasonable person would not have been aware that the actions at issue violated well established statutory or constitutional rights. . . . Whether the City employees are immune turns on the objective reasonableness of their conduct in light of clearly established law, not on their subjective good faith." Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985), amended, 784 F.2d 1407 (9th Cir. 1986).

The issue in this case is whether the fire investigators' conduct, judged objectively, was reasonable. The standard is whether a reasonable person would have known that plaintiffs' rights were violated. It is undisputed that defendants had the consent of the owner of the shopping center in which the Peasant Fare was located to enter the premises, that at the shopping center owner's direction, Doty obtained the key from the contractor repairing the presises, and that the shopping center owner exercised at least some control over the premises. We find that on these facts the defendants reasonably believed that they had the appropriate permission to enter and accordingly are entitled to qualified immunity.

The plaintiffs also argue that the district court improperly dismissed the conspiracy claim against Doty and Morgan. The complaint alleged that all the defendants conspired to deprive him of "his constitutional, statutory,

and common law state rights . . . all in violation of the United States Constitution, 42 U.S.C. [§] 1983." In opposing the defendants' summary judgment motion, plaintiffs asserted 42 U.S.C. § 1985(2) as the basis of the claim. The district court accepted this characterization but still found that their complaint failed to state a cause of action. In the appellate brief, plaintiffs now claim to have brought their conspiracy cause of action under § 1983.

A party may not change a theory of recovery on appeal in the absence of exceptional circumstances. Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984); see also International Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985) (issues not before the district court will not be heard on appeal except to prevent manifest injustice).

Plaintiffs do not explain their sudden change of heart, and we decline to consider a theory not raised below. Even if we permitted the plaintiffs to argue the § 1983 conspiracy claim, they provided nothing more than a bare assertion in support of the allegation.

IV.

Plaintiffs contend that the district court erroneously granted the defendant insurance companies a directed verdict by not including the alleged conspiracy issue on the verdict form. Plaintiffs claim they sent a note to the judge, pointing out the omission. However, the absence of the note from the record precludes a determination of whether the plaintiffs adequately preserved their rights. Even if the note was an adequate objection to the court's failure to include a conspiracy question on the form, the plaintiffs provide no reasons why the judge erred in granting a directed verdict.

The district court is AFFIRMED.

APPENDIX B

7.16 MOTION FOR RECONSIDERATION - A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral of [sic] written argument made in support of or in opposition to the original motion.